IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.9149 OF 2004

M/s. Permanent Magnets Ltd.]
Dattapada Road]
Borivli (E) Mumbai-400066]..Petitioner

Vs.

1. Shri.Umashankar Pandey]
Shailendra Singh Chawl,]
Devi Pada,, Borivli (E)]
Mumbai-400066]
]
2. Hon'ble Member]
Industrial Tribunal]
New Administrative]
Building, Bandra (E)]..Respondents

...

Mr.Shirish Naik for Petitioner
Mrs.Nilima Datta for Respondent no.1

...

CORAM : B.H.MARLAPALLE,J.

DATE : APRIL 28,2005

ORAL JUDGMENT:

1. Heard the learned counsel for the respective parties. Perused the record and proceedings received as per the order passed on 24.1.2005. The Petitioner-Company has challenged the judgment and order dated 28.4.2004 passed by the learned Member of the Industrial Tribunal at Mumbai in Application (IT) No.1 of 2002 filed in Reference (IT) No. 97 of 1992. It was an application filed under Section 33(2)(b) of

the Industrial Disputes Act, 1947 by the Petitioner-company and the same has been dismissed, as a result of which the dismissal order dated 21.2.2002 stands set aside.

2. Rule. Mrs.Dutta waives service for the Respondent. Petition is taken up for hearing forthwith for final disposal.

3. Brief facts leading to the impugned order and which are not disputed, could be summarised as under:

. The Respondent was in the employment of the Petitioner-Company as a semi skilled-A Grade Worker and was a confirmed employee. He was sanctioned leave from 13.6.2000 to 24.6.2000 and he was expected to resume his duties on 26.6.2000. He failed to report for duty on expiry of leave and hence was issued the charge-sheet-cum-suspension order dated 4.10.2000. It was alleged that after 26.6.2000 the company did not receive intimation either to extend leave or any reason regarding the employee's failure to report to duty. The company claimed that letters were sent and there was no response. He was charge-sheeted for the following misconducts:

1)	24(1) Habitual absence without leave or absence without leave for more than 10 consecutive days or

		overstaying the sanctioned leave without sufficient grounds or proper or satisfactory explanation;
2)	24(2)	Commission of any act subversive of discipline or good behaviour on the premises of the establishment.

. While informing him that he remained absent beyond the sanctioned leave from 26.6.2000 to 4.10.2000 continuously, he was placed under suspension and was also informed that the enquiry into charges against him, would be commenced on 14.10.2000 at Adarsha Nagar, Seva Sangh, Kajupada, Borivli (E). The charge-sheet was in English and it was served on him in person on 4.10.2000 at the factory gate. The Respondent does not understand English and therefore, on his demand, Hindi translation of charge-sheet was supplied subsequently and thereafter, he submitted his reply to the charge-sheet and denied the charges. He remained present in the enquiry on 14.10.2000 and tried to submit medical certificates in support of his contentions that he was hospitalised and therefore, could not report for duty till the end of September, 2000. The enquiry was adjourned and he was advised to submit the medical certificates on the subsequent date. The enquiry officer was changed and the enquiry commenced only in August, 2001 i.e. after about 10 months. The enquiry officer submitted his report on 12.2.2002 and held that charges against

the workman, were proved. A copy of the findings was sent to the workman and finally the order of dismissal was passed on 21.2.2002. As a reference for adjudication i.e. Reference (IT) No. 97 of 1992 was pending before the Industrial Tribunal an application under Section 33(2)(b) of the Industrial Disputes Act was submitted on the same day seeking approval to the order of dismissal. The preliminary point regarding the legality of the enquiry was framed and it was answered against the Petitioner-company after recording the oral evidence on the said point by the impugned award. The learned Member therefore, declined to grant approval and dismissed the application.

4. Mr.Naik, the learned counsel for the Petitioner by placing reliance on the decision of the Constitution Bench in the case of **Kalyani (P.H.) and Air France, Calcutta [1963 1 L.L.J. Supreme Court 679]** submitted that after the Industrial Tribunal recorded a finding that the domestic enquiry conducted was vitiated, it was necessary for the Tribunal to call upon the company to prove the charges by conducting de-novo enquiry before the Tribunal and more so, in the application submitted before the Tribunal such a prayer was made by the Petitioner-company. This is an error apparent on the face of the record and impugned order is against the

well established legal position by a catena of decisions. The application could not have been decided finally unless the Petitioner was given an opportunity to conduct a de-novo enquiry before the Tribunal. The learned counsel also placed reliance on the decision in the case of **Firestone Tyre and Rubber Co. of India Pvt.Ltd. Vs. Workmen [1981 II LLJ 218].**

5. Mrs.Dutta, the learned counsel for the Respondent on the other hand, has supported the view taken by the Tribunal and by referring to the documentary evidence placed before the enquiry officer, it was submitted by her that even otherwise the charges levelled against the workman were not proved. She reiterated that the company was aware about the ill-health of the workman, his salary for the month of June, 2000 was paid to an authorised representative on the basis of the written application in which it was stated that he was unwell and therefore, could not come personally to collect the salary. After the charge-sheet was issued, the workman tried to submit the medical certificates but they were not accepted and infact, before the charge-sheet was served on 4.10.2000, the workman had visited the factory on 1.10.2000 and he was not allowed to report for duty and was informed that he was placed under suspension. The workman was sought

to be victimised solely because of trade union activities inasmuch as he was nominated to be an office bearer of the rival union. The workman had put in about 25 years and in the year 1995, he was given a special award to maintain his attendance record. The learned counsel further submitted that even if fresh enquiry was directed to be conducted, there would be no other evidence apart from the documentary evidence placed by the workman before the enquiry officer on which he was cross-examined at length and therefore, in such circumstances, it is not necessary to allow the petition solely on the ground that the Tribunal failed to conduct a de-novo enquiry as prayed for by the company in its approval application. The learned counsel has relied upon the decisions in the case of **(1)Lalla Ram Vs. Management of D.C.M.Chemical Works Ltd. and another [AIR 1978 SC 1004], (2) Jiapur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and others [(2002) 2 S.C.C. 244)], (3) Indian Telephone Industries Ltd. and another Vs. Prabhakar H.Manjure [(2003) 1 S.C.C.320] and (5) Anil R.Joshi V. Air India Ltd. (2003 1 CLR 131)**.

6. Let us first go to the issue of the enquiry being fair and legal and in keeping the principles of natural justice. In the impugned order, this issue has been answered against the employer solely for the

reasons that no reasonable opportunity was provided to the Respondent-workman to examine his witness viz. Mr.Manglu Keval. The workman had stated that he had sent the authority letter to collect his salary for the month of June, 2000 through this Manglu Keval and therefore, he was a relevant witness so as to prove that such a letter was delivered to the Company. The enquiry officer on the other hand held that Mr.Manglu Keval was not an employee of the company and therefore, he being an outsider, he could not be allowed to be a witness in defence.

7. If regards be had to the charges levelled against the workman and the evidence he had placed on record by way of medical certificates before the Enquiry Officer this witness was not infact, a relevant witness. There were two charges levelled against the workman and if the first was answered in the negative, the second would not survive. The first charge has two parts viz. (a) habitual absence without level or absence without leave for more than ten consequent days and (b) overstayed the sanctioned leave without sufficient grounds or proper or satisfactory explanation.

. The Company’s case fell in the second part viz. the workman had remained absent after the sanctioned leave on 26.6.2000 and he did not report for duty

till the end of September, 2000. To prove this charge, it was necessary to hold that the explanation furnished or the evidence placed on record by the charge-sheeted workman was not acceptable or was not proper or satisfactory.

8. At this stage, it would be relevant to note that when the enquiry recommenced on 24.8.2001 on changing the enquiry officer for the best reasons known to the company, the proceedings continued right upto 2.2.2002. The enquiry proceedings are on record and they run into handwritten 173 pages. The charge-sheeted workman participated in the proceedings, he was duly defended, he was allowed to cross-examine the witnesses of the company and he was also allowed to lead his evidence. The enquiry proceedings do not make out a case that it was conducted in breach of the principles of natural justice. The enquiry was conducted in a fair and proper manner which is obvious by reading the enquiry proceedings recorded from time to time. The workman was also allowed to record his defence statement and a copy of the finding was made over to him before the dismissal order was issued. The findings of the tribunal that the enquiry was vitiated are thus indefensible.

9. In the case of **Kalyani (supra)**, the Constitution

Bench while dealing with an application submitted under Section 33(2)(b) of the I.D.Act, held inter alia as under:

> . "It is now well settled by number of decisions of this Court that it is open to the tribunal to go into propriety of an order of dismissal itself when there is defect in the domestic enquiry."

It further proceeded to observe as under:

> . "If the inquiry is defective for any reason, the labour court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified. However, on coming to the conclusion on its appraisal of evidence adduced before it that the dismissal was justified, its approval of the order of dismissal made by the employer in a defective enquiry would still relate back to the date when the order was made."

. In the case of **Lalla Ram (supra),** a two-judge Bench set down the following principles while deciding the application filed under Section 33(2)(b) of the Act:

> . "(i) Whether a proper domestic enquiry in accordance with the relevant Rules/Standing Orders and principles of natural justice has been conducted, (ii) whether prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out, (iii) whether the employer came to a bonafide conclusion

> that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee regard being had to the legal position settled, (iv) whether the employer had paid over or offered to pay wages for one month to the employee and (v) whether the employer has simultaneously or within such reasonably short time as to form part of the transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him".

10. The scope of this petition will have, therefore, to be considered on the basis of the above mentioned requirements of law. As noted earlier, the employee in his explanation to the charge-sheet had pointed out that he was hospitalised when he went to his native place on sanctioned leave and on 24.8.2001 when the inquiry recommenced, he placed on record all the certificates. The first Medical Certificate issued by a private Medical Practitioner at Kotha Bazar, stated that the workman was under the said Doctor’s treatment from 23.6.2000 to 28.6.2000 (six days) as he was suffering from fever. The second Medical Certificate dated 29.6.2000 was issued by a Govt. Hospital where the workman was admitted from 29.6.2000, thereafter, he was issued another Medical Certificate dated 10.8.2000 which indicated that he would be under medical treatment for another six weeks. The next Medical Certificate dated 21.9.2000 which stated that he would take ten more days to recover fully. The fitness Certificate dated

30.9.2000 was finally issued by the said Govt. Hospital and he was declared to be fit to resume duties. Before the Enquiry Officer, the workman was cross-examined by the Presiding Officer and he was asked why he could not submit medical certificates earlier, the workman replied that he was not in a condition to send the certificates by post and thought that on reporting for duty, he would submit all these certificates. The enquiry proceedings also indicate that his salary for the month of June, 2000 was released on the basis of an authority letter. In his reply to the approval application submitted before the Tribunal, the workman specifically stated that on 1.10.2000, he started his return journey to Mumbai and went to report for duty on 3.10.2000 at 8.30 a.m. He was told by the Security Personnel that there was a notice not to allow him to join for duty. When he again reported for duty on subsequent two days, he was not allowed to report for duty and on 6.10.2000, when he went to report for duty, again he requested to accept the medical certificates but instead, he was served with the charge-sheet and suspension order dated 4.10.2000. This service in person is not disputed. The Company had claimed in the charge-sheet that when the workman failed to report for duty on 26.6.2000 reminders were sent to him on 15.7.2000 and 14.9.2000. There was no proof brought on record that these letters were served on

the Petitioner or any of his family members. They were just returned by the postal authorities and were not registered letters. The evidence placed before the enquiry officer thus went to prove that the workman was under medical treatment and as soon as he was declared fit to report for duty, he reported for duty on 3.10.2000 but was not allowed to report. Though he overstayed the sanctioned leave for about more than three months, he had furnished sufficient explanation regarding the circumstances compelling him to remain away from duty and therefore, the charge levelled by the Company could not be substantiated. There was no reason for the enquiry officer to record a finding that the charges were proved. As noted earlier, if the first charge was not proved, automatically the second charge would not survive. It was necessary for the Tribunal to examine the evidence on record placed before the domestic tribunal and come to a conclusion that whether the prima facie case was made out by the employer to support the order of dismissal. Though the Tribunal failed to do so, having examined the evidence before the Enquiry Officer, the irresistible finding is that there was no material to support the charges levelled against the workman.

11. The workman had put in about 25 years of service which is not disputed. He was shown to be an office

bearer of the Association of Engineering Workers which was a rival union to the existing i.e. Kamgar Utkarsha Sabha. His leave record was impeccable. He was awarded a merit certificate "Sanman Patra" by the Company. He did not fall in the category of habitual absentee. The first enquiry session commenced on 14.10.2000 but thereafter, there was no progress in the enquiry till 24.8.2001 and the enquiry officer was changed. In the meanwhile, the workman remained under suspension. The Model Standing Orders enable the employer to place a workman under suspension but such a power is normally exercised when the employer forms an opinion that the presence of the charge-sheeted employee is likely to vitiate the discipline in the factory or is likely to tamper with the evidence. In the case of charge of absenteeism or overstaying the sanctioned leave, the employer evoking the power of suspending the employee is most unwarranted. All these acts cumulatively indicate that the employee was proceeded against by way of victimisation and thus an act of unfair labour practice at the hands of the employer.

12. By following the earlier decision in the case of **Kalyani (Supra)**, the Constitution Bench of the Apex Court in the case of **Jaipur Sahakari Bhoovikas Bank Ltd.(Supra).** held that if the approval application was rejected, the dismissal order would stand set

aside and the workman would be entitled for all the benefits as if in service. The observations made in para no.14 in the case of **Jaipur Sahakari Bank Ltd.(Supra)** are reproduced as under:

> "Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if the order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement."

. The Industrial Tribunal while dismissing the

application did not clarify about the backwages but in view of the settled position in law, the employee would be entitled for all the benefits as if in service and that the dismissal order was never passed against him.

13. In the premises, it is held that the domestic enquiry against the Respondent-workman was fair and proper and it was not in breach of the principles of natural justice. It is further proved that the employer could not make out a prima facie case supporting the dismissal order as the charge of overstaying the sanctioned leave could not be proved before the Enquiry Officer. The findings recorded by the Enquiry Officer against the workman are unsustainable. The approval application was rightly rejected by the Tribunal though on different premises. No interference is called for under Article 227 of the Constitution in the impugned decision of the Tribunal.

14. Hence, this petition fails and the same is hereby dismissed. Rule discharged with no order as to costs.

15. Civil Application No.1108 of 2005 is allowed and the amount deposited with the Registrar of this Court by the Petitioner-Company shall be paid to the

applicant forthwith.

16. Oral application made for stay to this order, is hereby rejected.

[B.H.MARLAPALLE,J.]